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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1564

JAMES JONATHAN MAPP, et al.,

Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cause on October 20, 1975 and January 27, 1976.

Opinions Below

The District Court memorandum and order of June 20, 1974 are unreported and are printed in the appendix hereto, App. 1a, 6a. The Court of Appeals opinion of October 20, 1975 is reported at 525 F.2d 169 (6th Cir. 1975) and is printed in the appendix hereto, App. 8a. The Court of Appeals opinion of January 27 denying rehearing and rehearing *en banc* is reported at 527 F.2d 1388 (6th Cir. 1976) and is printed in the appendix hereto. App. 28a.

Jurisdiction

The judgment of the Court of Appeals was entered on October 20, 1975 (App. 8a). On January 27, 1976, the Court of Appeals denied application by petitioners herein for rehearing *en banc* (App. 28a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Question Presented

Were the lower courts correct in finding that a 1971 zoning desegregation plan for high schools in Chattanooga, Tennessee was constitutionally sufficient and required no modification which, in July 1974, left 59% of the black high school student population in two traditionally black facilities where integral portions of that plan for elementary and junior high designed to achieve desegregation at those levels had not been fully implemented at that time, majority-to-minority transfer provisions of the plan had not been implemented for elementary and junior high levels as proposed, the plan for high schools itself had not been fully implemented, and where significant changes had occurred in population and pupil attendance patterns and in the configuration of the system as a result of annexation during the over two-year span between the time the plan was developed and the date it received final district court approval.

Constitutional Provision Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

History of the Litigation

This action was commenced on April 6, 1960 on behalf of a class of black children and parents seeking an end to state-imposed racial segregation in Chattanooga, Tennessee public schools. Proceedings pertinent to this petition commenced in 1971.[1]

On May 19, 1971 the district court held that the Chattanooga Board of Education (hereinafter Board) had failed to create a unitary system and directed it to develop a plan to be implemented by September, 1971. On July 26, 1971, the court approved, with certain minor revisions, the Board's Amended Desegregation Plan for elementary and junior high schools; it withheld final approval, however, of the high school plan pending receipt of data on capacity of four academic curriculum high schools and directed the Board to implement the proposed high school plan as an interim measure in September, 1971. 329 F.Supp. 1374 (E.D. Tenn. 1971). Shortly thereafter, the court granted the Board permission to delay implementation of those portions of elementary and junior high plans which could not be effectuated until additional transportation facilities were acquired.

On February 4, 1972 the district court gave final approval to the Board's plan to establish a system-wide vocational-technical high school, but withheld such approval with respect to the zoning proposal for the other four high schools, directing officials to report by June 15, 1972 on whether

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[1] The history of petitioners' efforts to achieve a unitary system in Chattanooga between 1960 and 1967 is recounted in: 295 F.2d 617 (6th Cir. 1961); 203 F.Supp. 843 (E.D. Tenn. 1962), *aff'd* 319 F.2d 571 (6th Cir. 1963); 373 F.2d 75 (6th Cir. 1967); and 274 F.Supp. 455 (E.D. Tenn. 1967).

further desegregation was required at that level. It ordered that elementary and junior high school desegregation be implemented fully not later than fall, 1972. Appeals were taken with respect to district court judgments entered between July, 1971 and February, 1972 which were affirmed *en banc* on April 30, 1973. 477 F.2d 851 (6th Cir. 1973). Certiorari was denied by this Court on November 12, 1973. 414 U.S. 1022 (1973).

On July 20, 1973, the Board moved for further relief seeking an adjustment of the 1971 desegregation plan approved by the trial court on July 26, 1971, as amended by subsequent orders. The Board's motion was denied by the district court on November 16, 1973, which ordered that complete implementation of the 1971 plan be accomplished no later than by the beginning of the January, 1974 semester. The court also gave its final approval at that time to the Board's 1971 plan for high school desegregation. 366 F.Supp. 1257 (E.D. Tenn. 1973).

On December 24, 1973, petitioners filed a motion to amend the November 16, 1973 opinion and for a new trial and/or further relief. The motion sought an order requiring the Board to develop a new desegregation plan rather than to implement fully the 1971 proposal. By memorandum and order of June 20, 1974, the district court denied petitioners' December 24, 1973 motion.

The Board appealed from the order of November 16, 1973 denying its motion to amend the desegregation plan, which it asserted became final upon the denying on June 20, 1974 of petitioners' motion to amend and for a new trial or further relief. Petitioners appealed directly from the June 20, 1974 denial of their motion by the district court.

On October 20, 1975, the Court of Appeals for the Sixth Circuit affirmed the trial court's rulings. (App. 8a) Re-

hearing and rehearing *en banc* were denied by that court on January 27, 1976 (App. 28a). The Board filed a petition for a writ of certiorari from this Court on January 29, 1976, which has not been acted upon as of this date. *Board of Education of the City of Chattanooga* v. *Mapp*, No. 75-1077, O.T. 1975 (44 U.S.L.W. 3445).

History of Desegregation in Chattanooga

In 1962, the trial court approved an eight-year plan of desegregation involving gradual conversion from dual geographic zones to unitary zones for elementary and junior high grades and continued use of freedom of choice on the high school level, extending that choice to black students for the first time in 1967. During the 1962-63 academic year eighteen (18) all-black schools were maintained—one senior high, three junior high and fourteen elementary schools.

Though implementation of this plan was accelerated in August, 1965 by the Court to ensure its completion by September, 1965, a number of all-black or virtually all-black schools were still in operation. Twelve (12) elementary schools were between 96-100% black; four (4) junior highs were 99-100% black; and two (2) senior highs were 99 and 100% black respectively. The all-black elementaries enrolled 82% of the system-wide black elementary population; the all-black junior highs enrolled 73.5% of the system-wide total; and the all-black highs enrolled 83.9% of the system-wide total of black students at that grade level. At that time the racial ratio for the entire system was 48.8% black and 51.2% white.

On May 19, 1971, the district court found that previous plans had not succeeded in accomplishing a unitary system and directed the Board to submit further plans for the final accomplishment of a unitary school system in Chatta-

nooga. The Board's plan proposed to accomplish a ratio of not less than 30% nor more than 70% of any race in most elementary and junior high schools in the system through techniques of pairing, clustering, rezoning and majority-to-minority transfers. Seven schools were to be closed.

Insofar as high schools were concerned, the Board proposed to retain the five facilities then in use. Four schools —two all-black (Howard and Riverside) and two majority white schools (Brainerd and Chattanooga)—would be rezoned and utilized solely for academic programs. Zones for these schools would be drawn to ensure that the newly-created junior high zones fed into them. Kirkman, which offered only technical and vocational training, would be left unzoned; vocational-technical programs at Howard and Riverside, the two black schools, would be transferred to Kirkman. As a result, changes in the racial compositions at the high schools would be as follows:

	1970-71		*Proposed (1971 Plan)*	
	% B	*% W*	*% B*	*% W*
Brainerd	14	85	32	68
Chattanooga	10	90	44	56
Howard	100	0	70	30
Riverside	99	1	68	32
Kirkman	11	89	45	55

The Board's projections for the high schools were dependent in large part upon the extent to which proposals for elementary and junior high facilities were realized. Additionally, the plan contained a majority-to-minority transfer provision like that approved by this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 26-27 (1971).

On July 26, 1971, the district court approved the Board's proposals for desegregation of elementary and junior high

grades but granted only tentative approval to the high school plan. Though it permitted the high school plan to be implemented on an interim basis in September, 1971, the Court directed the Board to provide it with additional information on capacities of the facilities involved and on the extent to which non-resident tuition students, from surrounding Hamilton County and elsewhere, were enrolled in Chattanooga high schools.

In September, 1971, most of the Board's desegregation proposals for desegregation of the elementary and junior highs, including majority-to-minority transfers, were not implemented. New zones were established for the four academic high schools and one vocational-technical high was opened on a system-wide basis. A number of vocational-technical courses continued to be offered, however, at the two traditionally all-black high schools. Since the plan was not implemented in any meaningful sense in September, 1971, the Chattanooga school system at that time had ten 99-100% black elementaries and four 99-100% black junior highs. Racial ratios at the high schools in September, 1971 as compared to those projected in the plan were as follows, excluding students still assigned to vocational-technical courses in the two black highs:

	% B Projected	*% B Actual*
Kirkman	45	25
Brainerd	32	33
Chattanooga	44	33
Howard	70	96
Riverside	68	97

No implementation of elementary provisions of the Board's 1971 plan had occurred by the start of the 1972-73 academic year. As of October 9, 1972, the Chattanooga system had five (5) all-black elementaries and five (5)

others with black ratios between 92 and 99.7%; 69% of all black elementary students in the system were enrolled in these ten schools. There were two all-black junior high schools and two (2) others with 99.7% black enrollments; these four schools enrolled 63% of the entire black junior high population. At that time blacks constituted 56% of the total elementary school population and 58% of the total junior high school population in Chattanooga. At the high school level, the black ratios at the five high schools, as compared to those in September, 1971 were as follows:

	% B—9/23/71	*% B—10/9/72*
Kirkman	25	36
Brainerd	33	45
Chattanooga ...	33	45
Howard	96	95
Riverside	97	95

At that juncture, blacks comprised 59% of Chattanooga's total high school population. Of this total, 59% were enrolled in Howard and Riverside.

On July 20, 1973, the Board moved the district court to permit it to modify its 1971 desegregation plan "because of changed circumstances since said Amended Plan was designed and judicially approved" and for an evidentiary hearing in order to support its claims to a need for modification. Generally, the avowed purpose of the Board's proposed modifications was to achieve "a viable racial mix" in as many schools in the system as possible. As defined by the Board, "a viable racial mix" was having 20 to 40 percent black students and 80 to 60 percent white students in a school within the system, even though the black-white ratio at that time was 59% to 41%. The district court rejected the Board's proposed modification by opinion of November 16, 1973 and order of December 18,

1973. It remarked as follows with respect to the Board's proposal:

> Contending that their experience indicates that schools having more than 35% black student enrollment tend to lose their white student enrollment rather rapidly, the substance of the defendants' proposed plan is to be accomplished by increasing the number of all-black schools or substantially all-black schools. 366 F.Supp. 1257, at 1259.

The Court stated that annexation, not modification of the plan, was the means by which resegregation could be forestalled. In this regard, it observed that the following year "as a consequence of recent annexations, the Chattanooga Public Schools will have an all-time high student enrollment as well as again having a majority of white students." *Id.*, at 1260. In rejecting the Board's proposal, the court stated:

> Furthermore, to maintain its white majority schools, as an inducement for white students not to voluntarily withdraw, it would require year by year adjustment of the plan, presumably *ad infinitum*. Under such a plan, it would appear that the possibility of achieving a unitary school system could never occur until all demographic change ceased, an unlikely event in an urban society where for years the affluence of the City of Chattanooga, like other cities, has been constantly receding to the suburbs. *Ibid.*

The court did, however, grant final approval to the 1971 proposals for desegregation of the high schools, finding that the continued one-race character of Howard and Riverside was the result of conditions beyond the control and responsibility of the Board. It also approved the Board's proposal to assign students from the newly-

annexed areas to over 80% white facilities.[2] And, though no request for such a ruling was made by the parties, the court authorized the Board to effect zone changes "at any time" which were merely administrative, did not increase majority race ratios in any school or involved any annexed areas. Full implementation of the Board's desegregation plan, approved initially in July 1971, was ordered by the court by no later than the commencement of the midyear 1973-1974 school semester.

On December 24, 1973, petitioners filed a motion "to amend the opinion of November 16, 1973 and order filed December 18, 1973 and for a new trial and/or further relief." This motion was itself amended on January 7, 1974. In seeking a new trial and further relief, petitioners contended that the district court erred in ordering implementation of the 1971 plan by the second semester of the 1973-74 academic year. During the over two years between 1971 and 1973 when implementation of most of the plan's provisions for elementary and junior high school desegregation was held in abeyance, significant changes had occurred in the racial composition and configuration of the system that, it was argued, dictated the developing of a totally new desegregation proposal. And the fact that areas of Hamilton County were annexed while full implementation of the 1971 plan was temporarily suspended required, petitioners contended, that any new desegregation plan be drawn with the objective of utilizing these annexed areas to maximize desegregation.

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[2] Between 1971 and 1973, two heavily-white areas were taken into the city from Hamilton County, for many years the source of non-resident tuition students in Chattanooga public schools. For example, during the 1970-71 school year, a total of 620 such students from Hamilton County were enrolled in the five Chattanooga high schools. One area encompassed an existing county school building, a 96% white elementary, and one did not. In total, these areas brought approximately 480 white and 31 black students into the Chattanooga public schools.

On June 20, the district court denied petitioners' motion, as amended, for a new trial and further relief in the following language:

> Turning next to the plaintiff's motion and amended motion for a new trial or for further relief, the Court is of the opinion that the motions are without merit and should be denied. The provisions of the judgment of this Court entered upon August 5, 1971, pursuant to the opinion of the Court set forth at 329 F.Supp. 1374 and affirmed upon appeal at 477 F.2d 851, together with the provisions of the judgment entered upon December 18, 1973, pursuant to the opinion of this Court set forth at 366 F.Supp. 1257 are believed to be sufficient to provide for any necessary or appropriate further supervision by this Court in this case. (App. 4a).

The Court of Appeals' Decisions of October 20, 1975 and January 27, 1976

On October 20, 1975, the Court of Appeals for the Sixth Circuit affirmed by a vote of 2-1 the trial court's orders of December 18, 1973 (denying the Board's motion to modify the 1971 plan) and of June 20, 1974 (denying petitioners' motion for a new trial or further relief). To the extent that the Board or petitioners were asserting that the trial court erred in rejecting their suggestions that the 1971 desegregation plan be revised totally, the majority ruled that such matters had already been resolved by its *en banc* decision in April, 1973 which gave full approval to that plan except insofar as the high schools were concerned. It concluded, therefore, that the sole remaining issue was whether the trial judge erred in giving final approval to the desegregation plan for high schools, only tentatively approved since July, 1971. On that is-

sue, the majority held that the trial court's determination that the continued one-race character of Howard and Riverside Highs "was due to a substantial departure of white students from the public schools in Chattanooga," "beyond control and responsibility of the School Board" was not clearly erroneous (App. 12a). Its conclusion in this regard was articulated as follows:

> Having implemented the plan for desegregating the high schools by establishing zones for attendance which were designed to achieve a high degree of racial balance throughout the system, and having provided further for continuance of a majority-to-minority transfer policy the district judge conceived that he had obeyed the mandate of Brown v. Board [citation omitted] and Swann v. Charlotte-Mecklenburg Board of Education [citation omitted]. So do we. (App. 14a)

In dissent, Judge Edwards rejected the conclusions reached by the majority with respect to the constitutionality of the high school plan in the following terms:

> With all respect for the sincerity of my colleagues, I cannot join the majority opinion, or approve its result. If the majority opinion prevails in this court and in the Supreme Court, it will establish as law the proposition that approximately 60% of the black children in the high schools of the Chattanooga public school system may be continued forever in complete racial segregation in all black schools which were built as such under state law which required a racially dual system and which have been continuously segregated as such down to this very moment. I cannot square this proposition with the great command of the Fourteenth Amendment to provide all American citizens "the equal protection of the laws." (App. 15a).

Judge Edwards observed that the Board's strongest argument for the constitutionality of the high school plan was that 25% white students had been zoned into Howard and Riverside but that white students avoided going by resorting to "white flight". To this assertion he responded as follows:

> As to this measure we have no findings of fact concerning [the Board's] contention. But if we assumed their truth, we clearly would not have exhausted the possibilities for successful desegregation nor satisfied the constitutional command. Many possibilities for desegregation remain, including pairing of white and black schools and high school construction which would make desegregated zones more feasible. In any instance, the defendant school board should be required to propose a new and realistic plan to meet its constitutional duty. (App. 27a)

On January 27, 1976, the Court of Appeals denied petitioners' request that the case be reheard or reheard *en banc*, Judges Edwards and McCree dissenting. Judge Edwards wrote that "there can be no doubt that the two black high schools are racially separate public schools established and maintained by state action and that as to these, there has been no desegregation at all." (App. 29a)

REASONS FOR GRANTING THE WRIT

The Decisions of the Courts Below, Approving Full Implementation of a Desegregation Plan Two Years After It Was Developed Despite Changes In the Racial Composition and Configuration of the School District That Rendered Obsolete Projections That Dismantling of the Dual System Would Occur, Were Premised Upon An Erroneous Reading of This Court's *Swann* Opinion Which Should Not Be Allowed to Stand.

Demographic changes occurring in formerly dual systems between 1954 and 1971 do not lessen the constitutional duty of school boards to act affirmatively to eradicate the vestiges of state-imposed segregation. *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971) stated in this regard:

> The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts. The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems. This process has been rendered more difficult by changes since 1954 in the structure and patterns of communities, the growth of student population, movement of families, and other changes, some of which had marked impact on school planning, sometimes neutralizing or negating remedial action before it was fully implemented . . . The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. *Id.*, at 14-15.

Swann teaches, therefore, that the constitutionality of any desegregation plan must be evaluated in light of conditions presently existing in a formerly dual system, not of conditions when *Brown* was decided.

The lower courts acted contrary to this principle in several respects. First, the district court approved implementation in 1974 of a desegregation plan that was developed by the Chattanooga Board in July, 1971 but not effectuated in major respects even as late as the end of the 1972-73 academic year. At the elementary level, the Board's 1971 plan envisioned closing five facilities, pairing sixteen schools, clustering six others and retaining three schools serving grades 1—6. Such an approach, the Board contended, would produce ratios of not less than 30% nor more than 70% of any race in 23 of its 28 elementaries. At junior high level, two schools were to be closed and new zones for the remaining ten would be drawn so that newly restructured elementary school zones would "feed" naturally into them. The Board's proposal for desegregation of the high schools involved establishing four centers—two all-black and two majority white—as zoned academic centers. Zones for these schools would flow naturally from those newly-established for the junior highs. One other high school would serve as an unzoned vocational-technical center, an arrangement that would result in its absorbing numerous vocational-technical courses then being offered in the two black schools. A majority-to-minority transfer provision meeting standards established by this Court in *Swann, supra,* was also included in the Board's proposal.

By the end of the 1972-73 academic year, however, little of the 1971 desegregation plan had advanced beyond the drawingboard. Only four elementaries had been paired, none clustered and one all-black school scheduled for clos-

ing had been kept open. The two junior highs scheduled for closing had been retained. No majority-to-minority transfer provision had been implemented for elementary or junior high students. At high school level, certain vocational-technical courses were still offered at the two black schools which, as in 1971, were virtually all-black. And, though the new zones for the four academic high schools had been established, technically speaking, the resemblance they bore to those described in the 1971 plan was artificial since the new elementary and junior high zones designed to feed into the high school zones had never been established. The system was not constitutionally better at the end of the 1972-73 academic year than in 1971 when the trial court found that the Board had failed to dismantle its dual system. No comprehensive desegregation plan had yet been implemented.

When petitioners suggested in December, 1973 that a new plan was necessary, the trial court should have recognized the fact that it was dealing then with a system that had never taken any meaningful steps to desegregate. Instead, it treated the situation as one in which a terminal desegregation plan which promised to "work realistically" and "work realistically now" had been implemented fully in 1971 but had failed for reasons beyond the control and responsibility of the Board. Therefore, the court reasoned, any attempt on its part to determine whether the 1971 plan offered any reasonable likelihood of achieving the "greatest possible degree of actual desegregation" would require year-by-year adjustments to correct for demographic shifts. That the Board's 1971 projections were based upon data for the system which was obsolete in December, 1973, and the largely-white areas had been annexed by Chattanooga between July, 1971 and December, 1973 (which was not foreseen in 1971) were insufficient

reasons, according to the court, to justify a re-evaluation. In this, the trial court was clearly in error.

Secondly, the court of appeals erred in refusing to consider whether the 1971 plan for elementary and junior highs satisfied constitutional requirements. It stated as follows:

> Both appeals in effect seek to relitigate all of those same issues which we decided in an en banc decision in this Court, reported in *Mapp* v. *Board of Education*, 477 F.2d 851 (6th Cir. 1973), *cert. denied*, 414 U.S. 1022, 94 S.Ct. 445, 38 L.Ed.2d 313 (1973). We there affirmed a final plan of desegregation in all respects except as to the high schools in Chattanooga. (App. 9a)

As with the trial court, the court of appeals' position can be comprehended only by accepting an incorrect premise, i.e., that the 1971 plan for desegregating the elementary and junior high schools had been fully implemented when it was evaluated by the Sixth Circuit in April, 1973. In fact, the plan had not been fully implemented in July, 1973, contrary to the requirements of both *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968) and *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969) that vestiges of dual systems be eradicated "at once". The court of appeals review in early 1973, therefore, could have addressed only the *potential* ability of the 1971 plan to achieve meaningful desegregation at the elementary and junior high levels. In reaching the conclusion that the plan appeared to meet constitutional standards, the court of appeals relied upon fall, 1971 attendance figures and had nothing before it that reflected changes in the racial composition and configuration of the system by April, 1973. Thus, the court of appeals was properly charged with the duty to determine whether the trial court's

decision to order full implementation of the 1971 plan, was constitutionally correct, in the teeth of strong evidence that it would be able to effect no meaningful desegregation in 1974. Had it done so, the court of appeals would have been compelled to find error on the part of the trial court in this regard.

Finally, the court of appeals erred in two respects in considering the constitutionality of the Board's 1971 plan for high school desegregation. It operated on the incorrect assumption that the 1971 provisions had been fully implemented in September, 1971. In fact, vocational-technical courses were still being offered in the two black high schools in June, 1974 when the district court denied petitioners' motion for a new trial or further relief with respect to a new desegregation plan. And it evaluated the high school provisions without giving any consideration whatsoever to the question of how the Board's failure to implement significant portions of its 1971 plan for elementary and junior high schools affected the validity of projections in the plan with respect to the level of desegregation that was to be achieved. The zones and projections for high schools were dependent upon zones for junior highs being properly established, as they, in turn, were dependent upon elementary zones being drawn according to the plan's specifications. Projections of enrollment for the high schools were dependent as well upon the closing of two junior highs; junior high projections were dependent upon the closing of all five elementary schools under the plan. And all projections were linked to the implementation of a majority-to-minority transfer program for students at all levels. Common sense would seem to dictate that when many of the provisions of the plan at the elementary and junior high levels were not implemented as late as 1972-73, Board projections of meaningful high school desegregation lost

all meaning and accuracy. Yet the court of appeals persisted in viewing the high school provisions in a vacuum, as though they could realistically stand irrespective of what had occurred at elementary and junior high levels.

In sum, the lower courts have construed this Court's decision in *Swann, supra,* in a fashion that provides an open invitation for school boards to immunize themselves from effecting any meaningful desegregation by simply developing a plan that appears acceptable on paper while pursuing every tactical advantage to postpone the day when its implementation is actually required. If left uncorrected by this Court, such an interpretation of *Swann* will very likely produce significant erosion of other constitutional standards that have accelerated the desegregation process since 1971.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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